

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

BOB McNEIL, an individual, on behalf of  
himself, and all others similarly situated,

Plaintiff,

v.

CAPITAL ONE BANK, N.A.,

Defendant.

CASE NO. 1:19-CV-00473-FB-RER

**PLAINTIFF’S NOTICE OF FURTHER SUPPLEMENTAL AUTHORITY SUBMITTED  
IN OPPOSITION TO DEFENDANT’S MOTION TO DISMISS COMPLAINT**

In further support of his Opposition to Defendant’s Motion to Dismiss, Plaintiff submits the recent decision in adding to the numerous other motion to dismiss denials in substantially similar cases previously cited by Plaintiff.

On April 14, 2020, Judge H. Russel Holland of the District of Alaska denied a motion to dismiss a complaint alleging the improper assessment of more than one NSF Fee on the same “item.” In a well-reasoned, 18-page order in *Coleman v. Alaska USA Federal Credit Union*, No. 3:19-cv-0229-HRH (D. Alaska) (April 14, 2020), a copy of which is attached as *Exhibit A*, the court denied the motion to dismiss with respect to plaintiff’s breach of contract and breach of the implied covenant of good faith and fair dealing claims.

Both parties’ interpretations of the Account Agreement are plausible. It is plausible that a member could have expected to only be charged one NSF fee when she only gave one authorization for an ACH transaction, no matter how many times the merchant presented the transaction for payment. On the other hand, it is plausible to view the Account Agreement as allowing defendant to charge an NSF fee each time it received a request for payment and there were insufficient funds in the account. Because it is plausible that the Account Agreement “is reasonably susceptible of either meaning[,]” the contract may be ambiguous and defendant’s motion to dismiss plaintiff’s breach of contract claim must be denied.

*Id.* at 9 (citation omitted). The court also determined the plausibility of the breach of contract claim also rendered the implied covenant of good faith and fair dealing claim plausible. *Id.* at 14.

The court in *Alaska USA* went on to identify another ambiguity—one that applies directly here. As in this matter, the account contract in *Alaska USA* conflated overdraft fees (charged on items paid into overdraft) and NSF Fees (charged on items returned for insufficient funds). For both, the contract stated that a single fee would be assessed for each “item.” Plaintiff in *Alaska USA* argued that because an overdraft fee can only occur *once* on an item that is paid into overdraft (since, once paid, it can never be processed a second or third time), it is reasonable to also understand the same is true for an item that is returned for insufficient funds.

According to the court: “the fact that in some instances, the Account Agreement uses ‘item’ to refer to an act that can only occur once does suggest that it is plausible that the contract is susceptible to two reasonable interpretations and thus may be ambiguous.” *Id.* at 13. Identical reasoning applies here, where Capital One promises that returned items and overdraft items can each incur a single bank fee and both types of items are referred to as having the same fee assessment practices in the Deposit Agreement.

Dated: April 15, 2020

Respectfully submitted,

/s/ Steven M. Nathan

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**CERTIFICATE OF SERVICE**

I certify that on April 15, 2020, a true and accurate copy of the foregoing Plaintiff's Notice of Further Supplemental Authority Submitted in Opposition to Defendant's Motion to Dismiss was filed electronically with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Steven Nathan  
Steven Nathan